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Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

March Term, 1971

No. 1798

SMITH TUG & BARGE CO., a corporation, and J. B. LANPHER, BIG CREEK & TELOCASET CO., an Oregon corporation, and MARIBETH W. COLLINS, ELMER R. GOUDY and ALTON L. COLLINS, personal representatives of the Estate of TRUMAN W. COLLINS,

Petitioners,

v.

COLUMBIA-PACIFIC TOWING CORPORATION, a corporation, RAINIER MANUFACTURING CO., a corporation, and BERT L. COLE, as commissioner of Public Lands of the State of Washington, and THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

SLADE GORTON,
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the decision of the Washington State Supreme Court involved a federal question of substance, and in such event, the decision was not in accord with applicable decisions of the Supreme Court of the United States.

2. Whether or not the decision of the Washington State Supreme Court in construing prior state decisions and the Washington State Constitution violated section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioners in the state courts below did not take the position nor present for argument the contention that the question of title to submerged lands lying beyond the line of ordinary high tide was a federal question. On the contrary, petitioners contended that state law controlled in determining title to the submerged area in its brief to the Washington State Supreme Court (Appendix A, p. 1, 3).

Exhibit 12 illustrates that both the Cowlitz River and Carrolls Channel in the Columbia River have gradually shifted in a generally easterly direction with accretions occurring on the westerly side of the Cowlitz River and on Cottonwood Island. This island separates Carrolls Channel from the main channel of the Columbia River. This shifting would deprive the State of Washington ownership of major portions of the bed of both the Cowlitz River and the Columbia River, along with adjacent tidelands, if the contentions of the petitioners had been upheld.

ARGUMENT IN OPPOSITION

I

The State of Washington urges that this case

does not present any substantial federal question relating to the boundary lines of federal patents.

The boundary lines of various patents of the United States between upland and water areas is the line of ordinary high tide or the high water mark in rivers where such line may be located at any such time, *Borax v. City of Los Angeles*, 56 S. Ct. 23, 296 U.S. 10, 80 L. Ed. 9 (1935), *Hughes v. Washington*, 88 S. Ct. 438, 389 U.S. 290, 19 L. Ed. 2d 530 (1967), *United States v. Washington*, 294 F.2d 830, cert. denied, 82 S. Ct. 828, 369 U.S. 817, 7 L. Ed. 2d 783 (1962), *Anderson-Tully Co. v. Murphee*, 153 F.2d 874 (8th Cir., 1946), *Hogue v. Bourgois*, 71 N.W.2d 47, 54 A.2d 633 (N.D. 1955).

Meander lines are not boundary lines of federal patents, *Shively v. Bowlby*, 14 S. Ct. 548, 152 U.S. 1, 38 L. Ed. 31 (1893), *Mann v. Tacoma Land Co.*, 14 S. Ct. 820, 153 U.S. 273, 38 L. Ed. 714 (1893), *Baer v. Moran Bros. Co.*, 14 S. Ct. 823, 153 U.S. 287, 38 L. Ed. 718 (1893). In *Mann v. Tacoma*, *supra*, and *Baer v. Moran Bros. Co.*, *supra*, the government patent was held not to include the tidelands out to the meander line. These decisions further decided that the Washington "disclaimer clause" of Article XVII of the Washington State Constitution did not convey any area out to the meander line because of the fact that the area had not been granted by a federal patent.

The water areas beyond the ordinary high wa-

ter mark have been uniformly held to be controlled by state law. *Borax v. City of Los Angeles, supra, Fox River Paper Co. v. Railroad Commission,* 47 S. Ct. 669, 274 U.S. 651, 71 L. Ed. 1279 (1926).

Petitioners stated in the Washington State Supreme Court that the extent of ownership of tidelands and beds were governed by state law, although federal law declared that the boundary of the patent was the ordinary high water line (see Appendix A, p. 1, 2, 3, 4).

The petitioner did not claim the area between the ordinary high tide line and the meander line lying out in the water was part of the patented area because of any federal rule governing the scope of the patent. On the contrary the sole claim to the area in controversy was based upon an interpretation of the "disclaimer clause" of section 2 of Article XVII of the Constitution of the State of Washington. Questions not raised in state court proceedings are not open to question in a Petition for Writ of Certiorari, *Ellis v. Dixon,* 75 S. Ct. 850, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied, 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759.

II

The decision of the Washington State Supreme Court does not violate the due process laws of the Fourteenth Amendment to the United States Constitution.

The test imposed by this court in determining whether the state court decision is in violation of the provisions of section 1 of the Fourteenth Amendment is fairly state in *Broad River Power Co. v. South Carolina*, 50 S. Ct. 401, 281 U.S. 537, 74 L. Ed. 1023 (1929). That decision indicates this court may inquire whether the state court has sought to evade the constitutional issue in construing or applying state law. However, if the grounds for the decision have fair support and rest upon a fair or substantial basis this court will not substitute its judgment as to what the state rule should be or determine whether it is right or wrong. *Demorest v. City Bank Co.*, 64 S. Ct. 384, 321 U.S. 36, 88 L. Ed. 526 (1944).

The decision of the Washington State Supreme Court is fair and reasonable under all the circumstances and has more than adequate support of prior Washington law. The court reviewed the applicable decisions relating to both the "disclaimer clause" and river boundary issues. It found that prior decisions including the case of *Washougal Transportation Co. v. Dalles, etc. Nav. Co.*, 27 Wash. 490, 68 P. 74 (1902) had never applied the "disclaimer clause" to rivers. On the contrary, the decisions concerning boundaries on rivers subscribe to the shifting boundary rules, i.e., gradual changes of the high water mark result in a corresponding shift in the boundary line. These decisions in many instances denied any

effect of the existence or location of meander lines. The shifting boundary rule was relied upon by the Washington State Supreme Court in *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946). The same result was had in *Glenn v. Wagner*, 199 Wash. 160, 90 P.2d 734 (1939).

The Washington court specifically indicated the existence of meander lines in the Duwamish River was unimportant in *Newell v. Loeb*, 77 Wash. 182, 137 P. 811 (1913) and in *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915). In a case between private parties the court in *Rue v. Oregon and Washington R. Co.*, 109 Wash. 436, 186 P. 107 (1920) adopted the shifting boundary rule and stated that meander lines were not boundary lines.

The result of *George v. Pierce County*, 111 Wash. 495, 191 P. 406 (1920), clearly implies the "disclaimer clause" is of no effect in determining ownership problems due to the shifting of rivers.

The petitioners' view of the import of the decision in *Washougal Transportation Co. v. Dalles, etc., Nav. Co., supra*, is clearly shown to be erroneous by the court's analysis of that case. The case of *Anderson-Tully Co. v. Murphee*, 153 F.2d 874 (8th Cir. 1946), relied upon by petitioners, is not controlling. It was an appeal from a Federal District Court decision where state law was being interpreted. The case does not involve a situation where

a federal court was rehearing state action in light of the Fourteenth Amendment.

The Washington State Court decision is clearly not an abrupt change in the law regarding vested rights. Section 2 of Article XVII of the Washington State Constitution has never been applied to solving boundary disputes in rivers. The decision is based upon a fair and well reasoned analysis of the cases involving the "disclaimer clause". It is clear that the decision has ample foundation in Washington law.

CONCLUSION

The question of ownership regarding the area between the line of ordinary high water and the meander line, when the meander line falls out in the water area, is not controlled by federal law. This has been an area repeatedly held to be subject to state law. The petitioner urged as much in the state court below. Nowhere has he pointed out wherein the state court decision is contrary to federal law.

The decision below is correct in light of all the prior decisions by the Supreme Court of the State of Washington and is clearly in line with the plain meaning of section 2 of Article XVII of the Washington State Constitution. It has overwhelmingly fair and substantial support in law. Nowhere do the records or decisions indicate that this decision evades any federal constitutional rights. It is a state court

decision fairly and reasonably decided containing no substantial federal questions.

The State of Washington urges the court to deny the petition for Writ of Certiorari.

Respectfully submitted,

SLADE GORTON,
Attorney General,

THEODORE O. TORVE,
Assistant Attorney General,
Counsel for Respondents.

APPENDIX A

Excerpts from Brief of Respondents Smith Tug & Barge Co. and The Big Creek and Telocaset Company in Smith Tug & Barge Co., et al. v. Columbia-Pacific Towing Corp., et al. on appeal from the Superior Court of Cowlitz County to the Washington State Supreme Court, written by Judson T. Klingberg and Gerry A. Reitsch:

"ARGUMENT IN SUPPORT OF JUDGMENT

I. * * *

A. * * *

B. *Interpretation of the Constitutional Disclaimer is Controlled by State Not Federal Law*

As recognized by the United States Supreme Court in *Borax v. City of Los Angeles*, 296 U.S. 10, 80 L.Ed. 9, p. 18, 56 S.Ct. 23 (1935):

> 'Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.'

Likewise, in *Fox River Paper Company v. Railroad Commission*, 274 U.S. 651, 71 L.Ed. 1279, 47 S.Ct. 669 (1926), the Supreme Court stated:

> '* * * the nature and extent of the rights of the state and of riparian owners of navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state (citing cases). If the state chooses to resign to the

> riparian proprietor, sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections.'

See also, *Washougal Transp. Co. v. Dalles, Etc., Navigation Co.*, 27 Wash. 490, 498, 68 Pac. 74 (1902); *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278 (1908).

C. *Upon Admission to the Union the State Became the Owner of River Beds and Tide Lands*

The navigability of the Columbia and Cowlitz Rivers is undisputed (see Appellants' Brief, p. 9). Lands underlying navigable waters, such as the beds of the rivers here involved, became the property of the State of Washington upon its admission to the Union.

Shively v. Bowlby, 152 U.S. 1, 26-31, 38 L.Ed. 331, 341-343, 14 S.Ct. 548 (1893)

Scott v. Lattig, 227 U.S. 229, 242, 57 L.Ed. 490, 33 S.Ct. 490 (1913)

United States v. Utah, 283 U.S. 64, 75 L.Ed. 844, 51 S.Ct. 438 (1930) (Colorado, Green and Grand Rivers)

D. *After Admission, the State Had the Absolute Right and Power of Disposition Over Such Lands*

* * *

II. APPLICATION OF FEDERAL LAW

A. * * *

B. * * *

C. *Federal and State Rules are Not Incompatible*

The Federal interpretation of grants made by its patents is not incompatible with interpretations which this court has put upon the constitutional disclaimer. Thus, the extent of the grant conveyed by a Federal patent is a matter of Federal Law. The Federal courts have said that such grants carry to the line of ordinary high water and accretions belong to the owner of land abutting the navigable waters. The State cannot diminish such grants as it attempted in *Hughes v. State*, 67 Wn.2d 799, 410 P.2d 20 (1966) and was prevented from so doing by the U. S. Supreme Court in *Hughes v. Washington*, 389 U.S. 290, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967).

On the other hand, the extent to which the State has disclaimed tide, swamp and overflowed lands under the state constitution is a matter of State law. Thus, where the meander line runs above or landward of the line of ordinary high water due to accretions, the high water mark controls and the successor in interest of the patentee owns to that line because Federal Law controls. Where the meander line runs below or riverward of the line of ordinary high water, the meander line is the boundary because State Law controls and the State, by its disclaimer,

has, in effect, conveyed such land to the successor of the patentee.

In *Hughes v. Washington*, supra, the U. S. Supreme Court did not purport, either directly or indirectly, to overrule any Washington decision other than that of Hughes itself.

* * * "